

BREIN

copyright enforcement

Books

Films & TV

Music

Interactive software

- Websites (platforms)
 - Uploaders
 - Hosting Providers
 - Access Providers
 - Search Engines
- Payment Processors
 - Advertising
 - Consumers

The Dutch Trilogy

how good facts make good case law

Prologue

Svensson, Kino, Aci Adam

Trilogy

GS Media, Filmspelers, The Pirate Bay

Epilogue

Accountability with and without liability

Communication To The Public

- Hyperlinking to an illegal source
- Selling devices linking to illegal sources
 - Streaming from an illegal source
 - Facilitating linking to illegal sources
- Blocking access to (links to) illegal sources

Prologue

- Svensson

Linking to authorised content on a site that is freely accessible to the public is not infringing

- Kino

Blocking of infringing site allowed if it not unnecessarily block legal content and at least discourages access

- Aci Adam

Downloading from an illegal source is illegal

Trilogy Part One

GS Media 8 Sept 2016 C-160/15

Linking to an unauthorized source

CJEU (confirms Svensson):

- CTTP requires 'indispensable intervention' with full knowledge of consequences
- Private linking – if knows or ought to know
- Commercial linking (for profit) – presumed knowledge, duty of care to verify legality

Trilogy Part Two

Filmspeler 26 Apr 2017 C-527/16

*Selling devices with software linking to illegal sources
Infringing CTTP or 'just' facilitating?
(superfast harmonization)*

CJEU (confirms GS Media):

- For profit – context sale of device
- With full knowledge - direct link, not mere technical facilities)
- Indispensable intervention – difficult to find

Bonus chapter on streaming (confirms ACI Adam)

- Temporary copy exception 5(1) InfoSoc 'to enable lawful use' not applicable: Buyer deliberately and in full knowledge accessing unauthorised content
- Does not meet three step test

Trilogy Part Three

The Pirate Bay 14 Jun 2017 C-610/15

Online p2p platform making available third party uploaded links to unauthorised content

Is it an infringing site? If not, may it be blocked?

CJEU interpretation of CTTP 3(1) InfoSoc: various criteria; not autonomous but interdependent; applicable to widely varying degrees; to be interpreted individually and in their interaction with each other

CJEU (confirms GS Media and Filmspeler:

- Operators managing p2p site, indexing, categorizing, deleting and/or filtering, cannot be unaware of unlawful nature of content and are liable for infringement jointly with users
- Not passive – no reference to safe harbour 14 eCommerce
- For profit – context advertising on site
- Constructed/presumed knowledge – not actual knowledge (were informed; could not be unaware; very large number of links to unauthorized content

Epilogue

- More active role of ISPs required (responsibility with but also without liability)
- Growing group of facilitators liable for infringement
- Profit in context and constructive/presumed knowledge – ex ante duty of care and ex post NTD & stay down
- More case law, more licensing

Essential reading:

Eleonora Rosati: The CJEU Pirate Bay judgment
and its impact on the liability of online platforms

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